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11   UNITED STATES DISTRICT COURT

12   NORTHERN DISTRICT OF CALIFORNIA

13   SAN FRANCISCO DIVISION

14

15 FUZZYSHARP TECHNOLOGIES, INC,   Case No. 12-cv-6375-JST

16   Plaintiff,   **DEFENDANT NVIDIA
                                           CORPORATION'S REPLY
17   v.   MEMORANDUM IN SUPPORT OF
                                           MOTION TO DISMISS PLAINTIFF
18 NVIDIA CORPORATION,   FUZZYSHARP'S AMENDED
                                           COMPLAINT**
19   Defendant.
                                           Date: July 18, 2013
20   Time: 2:00 p.m.
                                           Dept: Courtroom 9, 19th Floor
21   Judge: Jon S. Tigar
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1   Fuzzysharp's Amended Complaint should be dismissed with prejudice because it fails as a

2   matter of law. The Court already gave Fuzzysharp a chance to amend its complaint when it

3   granted NVIDIA's first Motion to Dismiss. Docket No. 28 (April 17, 2013 Order Granting

4   Motion to Dismiss) ("Dismissal Order"). However, aside from dropping claims for indirect

5   infringement, Fuzzysharp ignored the Court's guidance and filed an Amended Complaint that

6   contains the same deficiencies that led to the first dismissal. Now faced with a second Motion to

7   Dismiss, Fuzzysharp has responded with an opposition brief that does not adequately address any

8   of the grounds for dismissal raised by NVIDIA. *See* Docket No. 31 (Motion).

9   **(1)   Claims of Ongoing Infringement of Expired Patents Must Be Dismissed.**

10   Fuzzysharp alleged only ongoing infringement of two patents that expired nearly six

11   months before this lawsuit was filed. Docket No. 31 (Motion) at 6-7. This is impossible as a

12   matter of law. Fuzzysharp's only response to this shortcoming is a misplaced reliance on Form

13   18 of the Federal Rules of Civil Procedure. Docket No. 36 (Opp.) at 2. Contrary to Fuzzysharp's

14   argument, Form 18 does not allow Fuzzysharp to plead continuing infringement of patents that

15   expired before the complaint was filed. Fuzzysharp's Amended Complaint must be dismissed.

16   **(2)   Claims Against A Non-Party Must Be Dismissed.**

17   Fuzzysharp concedes that Count Two still fails to state a claim for relief because it

18   accuses only "Defendant Intel," a non-party to this action, of infringing an otherwise unidentified

19   "'0479" patent. Fuzzysharp's repeated filing of this allegation despite this Court's prior dismissal

20   on the same grounds was, in its own words, "serious and acknowledged." Docket No. 36 (Opp.)

21   at 2; Dismissal Order at 4; Docket No. 29 (FAC) at ¶ 19. For repeating the same flawed pleading

22   that resulted in the first dismissal, Count Two must now be dismissed with prejudice. *See Erwin*

23   *v. Grounds*, No. 12-00031-JST, 2013 WL 2422743, at *4 (N.D. Cal. June 3, 2013) ("Further

24   leave to amend will not be granted because plaintiff has already been granted leave to amend but

25   has been unable to set forth cognizable claims for relief."); *Edwards v. Fed. Home Loan*

26   *Mortgage Corp.*, No. 12-CV-04868-JST, 2013 WL 2355445, at *4 (N.D. Cal. May 29, 2013)

27   (dismissing claims in a First Amended Complaint that did not address previously identified

28   deficiencies).

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(3)   Claims of Willful Infringement Must Be Dismissed.

Fuzzysharp has never alleged that NVIDIA acted despite a high likelihood of infringing a known and valid patent, as required for a finding of willful infringement, because such an allegation is not supported by the facts surrounding this case. *See* Docket No. 31 (Motion) at 8-9; Dismissal Order at 3-4. The litigation history of the asserted patents – including Judge Armstrong's Order granting summary judgment of invalidity and Fuzzysharp's voluntary dismissal of its prior suit against NVIDIA – supports a reasonable belief that the asserted patents were invalid. Docket No. 31 (Motion) at 9. Moreover, Fuzzysharp once again failed to properly identify its prior lawsuit against NVIDIA and its Amended Complaint remains facially deficient for this reason as well. *Id* at 8. These claims must be dismissed. *See* Dismissal Order at 3 (citing *Vasudevan Software, Inc. v. TIBCO Software Inc.*, No. C 11-06638-RS, 2012 WL 1831543, at *4 (N.D. Cal. May 18, 2012)); *Erwin v. Grounds*, 2013 WL 2422743, at *4.

To survive a motion to dismiss, a plaintiff must plead facts that adequately support its claims. *See* Dismissal Order at 2. Rule 11 further requires a reasonable inquiry to ensure that factual allegations have evidentiary support and claims are warranted by existing law. Fed. R. Civ. P. 11. Fuzzysharp has failed, for at least a second time, to meet these basic requirements. Instead, it has continued to demonstrate an inability to plead facts sufficient to state a viable claim. Fuzzysharp's Amended Complaint should be dismissed with prejudice.

Dated: June 21, 2013   Orrick, Herrington & Sutcliffe LLP

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REPLY IN SUPPORT OF MOTION TO DISMISS
AMENDED COMPLAINT
12-cv-6375-JST